IN THE COURT OF APPEALS 07/02/96

OF THE

STATE OF MISSISSIPPI

NO. 93-KA-00064 COA

TONY GILMORE

APPELLANT

v.

STATE OF MISSISSIPPI

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. MELVIN KEITH STARRETT

COURT FROM WHICH APPEALED: COPIAH COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

WILLIAM D. BOERNER

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL BY: JEAN SMITH VAUGHAN

DISTRICT ATTORNEY: DUNN LAMPTON

NATURE OF THE CASE: CRIMINAL (FELONY)-BURGLARY OF COMMERCIAL BUILDING-TWO COUNTS

TRIAL COURT DISPOSITION: DEFENDANT GILMORE CONVICTED OF TWO COUNTS OF BURGLARY AND SENTENCED TO A TERM OF SEVEN YEARS FOR EACH COUNT, TO RUN CONCURRENTLY, ORDERED TO PAY COURT COSTS AND ATTY FEES AS WELL AS ORDERED TO PARTICIPATE IN A & D PROGRAM

BEFORE FRAISER, C.J., DIAZ, AND McMILLIN, JJ.

McMILLIN, J., FOR THE COURT:

Tony Gilmore has appealed his conviction for burglary in the Circuit Court of Copiah County on two grounds. One ground alleges that he was improperly denied the use a peremptory challenge during jury selection because of a misapplication of the principles of *Batson v. Kentucky* and its progeny. *See Batson v. Kentucky*, 476 U.S. 79 (1986). We conclude that this alleged error has merit and requires reversal of Gilmore's conviction; therefore, we will not discuss the second issue involving the weight of the evidence to support the jury's guilty verdict.

I.

Discussion

The defendant was denied a peremptory strike against a white male juror upon the trial court's conclusion that the non racial explanations advanced by the defense for exercising the challenge, in the words of the trial court, "did not rise to the requirement of exercising peremptory challenge based on a non-racial reason *once the Batson rule had been invoked by the defendant.*" (emphasis supplied) . The defendant argues that the reason advanced was sufficiently race-neutral; however, we determine that there is a more basic flaw in the disallowance of this challenge that requires this Court to reverse the conviction before reaching the issue of the viability of the offered explanation.

Some brief background of the course of *Batson*-related judicial decisions would seem helpful. The original decision in *Batson* dealt only with the limited instance where, in the trial of a member of a racial minority, it was alleged that the prosecution was improperly excluding prospective jurors of the same race as the defendant. *Batson*, 476 U.S. at 83-84. The United States Supreme Court subsequently expanded the prohibition of racially-motivated strikes by the prosecution to all criminal trials without regard to the race of the defendant. *Powers v. Ohio*, 499 U.S. 400, 415 (1991). In *Georgia v. McCollum*, the Supreme Court carried the prohibition one step further and, in what has come to be known as the "reverse *Batson*" case, ruled that strikes based on racial considerations were also prohibited to the defendant. *Georgia v. McCollum*, 505 U.S. 42, 55 (1992). There is more. Gender discrimination was prohibited in *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419, 1422 (1994), and discriminatory strikes in civil litigation were halted in *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 628-29 (1991). However, these cases do not bear directly on the issue now before this Court.

Critical to an understanding of the decision we reach today is a basic grasp of what is required, and conversely, what is *not* required procedurally when a *Batson* or *McCollum* issue is raised by either side during jury selection. The importance of limiting judicial interference in the exercise of otherwise statutorily-permitted peremptory strikes, especially in a *McCollum* or "reverse-*Batson*" case, cannot be underestimated, although it requires a somewhat circuitous path of reasoning to so demonstrate. It

has been said that peremptory strikes are not entitled to constitutional protection, *see, e.g., Davis v. State,* 660 So. 2d 1228, 1243 (Miss. 1995) (citations omitted), yet it has also been adjudicated that an arbitrary denial of a statutorily-created right may, in itself, be a due process violation of constitutional proportion. *See Stewart v. State,* 662 So. 2d 552, 557 (Miss. 1995) (citing *Hicks v. Oklahoma,* 447 U.S. 343, 346 (1980)). The only intrusions permitted upon the free exercise of peremptory challenges must, therefore, be strictly within the limited rationale and procedures set out in *Batson* and those related United States Supreme Court cases that followed. Otherwise, without the overriding dictates of the United States Supreme Court mandate, the trial court has no authority to interfere with the defendant's strikes authorized by statute. This must be seen to be true even when the trial court exceeds its authority out of an honest misunderstanding of the extent of the mandate of *Batson* or *McCollum.*

The Supreme Court, in a footnote to the *Batson* case that has not received the attention it deserved, said:

> In light of the variety of jury selection practices followed in our state and federal trial courts, *we make no attempt to instruct these courts how best to implement our holding today.*

Batson, 476 U.S. at 99 n.24 (emphasis supplied).

The footnote, though it prompts much of our discussion which follows, is somewhat misleading, because the decision does, in fact, set out a rudimentary guide as to how allegations of improper use of peremptory challenges should be handled. As a preliminary step to a full inquiry into the striking party's motives, the *Batson* decision requires the challenging party to make a prima facie showing of a discriminatory purpose in the opposing party's use of its strikes. *Batson,* 476 U.S. at 96-97. It is only when the challenging party has made such a prima facie showing that "the burden shifts to the [challenged party] to come forward with a neutral explanation for challenging" the prospective jurors. *Id.* at 97. The trial court may not, as apparently is often done, leap over the first step and require the challenged party to articulate a race-neutral reason upon the mere invocation of the name *Batson* or *McCollum.* Raising the issue in the first instance only requires the court to "consider," based on "all relevant circumstances," whether the challenging party "has made the requisite showing" to establish a prima facie case. *Id.* at 97. And it is clear that this preliminary determination must be made without consideration of what justifications the challenged party might subsequently be able to offer. *Id.* at 97.

A related consideration arises out of an apparent misconception shared by a number of trial judges that, if a defendant asserts his right to raise *Batson* to explore the State's motives in exercising its peremptory challenges, the trial court may (or must) automatically invoke *McCollum* to require the defendant to justify its peremptory strikes as a sort of "tit for tat" proposition. This idea may have been fostered from a (mis)reading out of context of the Mississippi Supreme Court's statement in *Griffin v. State* that "what's sauce for the goose is sauce for the gander." *Griffin v. State,* 610 So. 2d 354, 356 (Miss. 1992). *Griffin* was appealed prior to the *McCollum* decision on the theory that the

defendant was not bound by *Batson* considerations. It was decided by our supreme court after *McCollum* was handed down. The case does nothing more than acknowledge that the issue raised on appeal had, in the interim, been resolved against the defendant by the United States Supreme Court. It simply cannot be read as sanctioning the retaliatory imposition of *McCollum*. Nor is there any other authority known to this Court that would suggest the propriety of such a course of action by the trial court. *Batson* was designed to meet a particular objectionable situation, and *McCollum* another. The fact that one side may be exercising its peremptory challenges in an improper manner does absolutely nothing to raise an inference or presumption that the other side is engaged in a similar practice. The impropriety of the trial court arbitrarily requiring the defendant to articulate a non discriminatory reason for exercising his peremptory challenges solely because the defendant has previously questioned the motives of the prosecution is further shown by the rule announced in *Stewart v. State* that Mississippi, unlike some jurisdictions, does not sanction the trial court raising *Batson* considerations *sua sponte*. "A trial judge does not have the authority to invoke a *Batson* hearing on his own initiative." *Stewart v. State*, 662 So. 2d 552, 559 (Miss. 1995). *But see Lemley v. State*, 599 So. 2d 64, 71 (Ala. Crim. App. 1992); *Haschke v. Uniflow Mfg. Co.*, 645 N.E.2d 392, 395 (Ill. App. Ct. 1994).

The record in this case is sparse on the issue of how it came to pass that the defendant was required to articulate his reasons for exercising his peremptory challenges. Apparently the matter was addressed in chambers and off the record. Nevertheless, we conclude that the record is sufficient for us to conclude that the entire inquiry into peremptory challenges was due solely to the fact that the *Batson* issue was raised by the defendant and was not based on the State having made a *McCollum* challenge to the defendant's strikes. There is certainly nothing in the record to support a contention that the State made the necessary prima facie case of discrimination by the defendant to compel the articulation of race-neutral reasons for the strike. In these circumstances, this Court is bound by precedent to weigh this lack of evidence against the State. In *Stewart*, the supreme court said:

> The absence of the record stems from the fact that the trial judge erroneously required each party to give race neutral reasons upon the exercise of each challenge without requiring the opposing party to make a *prima facie* case of discrimination or even an objection to the exercise of the peremptory.

Stewart, 662 So. 2d at 559. The supreme court, in reversing Stewart's conviction, went on to say:

> Likewise, we hold that the trial court's failure to place the initial burden on the State to establish a *prima facie* case of racial discrimination was reversible error. The trial court arbitrarily prompted the *Batson* inquiry without there ever having been an objection by the prosecution.

Id. at 560.

Because we find that the trial court erroneously invoked *McCollum* considerations against the defendant for the apparent sole reason that he had raised a *Batson* challenge to the State's

peremptory strikes, and because we conclude that, under *Stewart*, the ensuing denial of the defendant's statutorily-authorized peremptory strikes was reversible error, there is no need to reach the question of whether the reasons articulated by the defendant were sufficiently race-neutral to survive the two-prong test of *Batson, i.e.*, that they (a) were facially race-neutral, and (b) even if facially race-neutral, were not a mere pretext to disguise the defendant's true racially motivated purposes.

II.

Conclusion

This opinion should not be read as carrying with it any implied criticism of the trial court in its handling of jury selection. The tenth anniversary of the *Batson* decision has now passed, and the trial courts of this State still remain without any concrete affirmative guidance as to the necessary procedural steps to handle allegations of discrimination in the exercise of peremptory challenges. The United States Supreme Court specifically declined to offer such guidance and it has not been forthcoming from any other source other than in the form of after-the-fact analyses of how not to do it. As a result, the trial courts of the State continue to understandably strike off in a multitude of different directions in dealing with what are complex issues made more confusing by certain rather arbitrary restraints on what the court may properly require of the challenged party. After ten years, our circuit judges deserve better.

By way of example of the potential availability of a solution to this problem, we note that a formal procedure for dealing with discovery violations in criminal proceedings was first proposed in Justice Robertson's concurrence in *Box v. State*, 437 So. 2d 19, 22 (Miss. 1983) (Robertson, J., specially concurring). The procedure, as set out in the opinion, was subsequently widely followed by the trial courts and became a useful tool in conducting a trial. It was later formalized into the Uniform Criminal Rules of Circuit Court Practice and recently brought forward into the new Uniform Circuit and County Court Rules.

Now that sufficient time has passed so that the various issues affecting *Batson* or offshoots of *Batson* have been considered in some depth, it appears that thought should be given to the idea of devising and implementing a model procedure, either through a judicial decision having prospective application or the adoption of a procedural rule, to handle *Batson* issues. Until some such guidance is received, it seems likely that our criminal justice system will continue to be clogged with unnecessary appeals dealing with errors that bear essentially no relation to the real issue with which the system should be dealing -- the issue of the guilt or innocence of the accused.

THE JUDGMENT OF THE COPIAH COUNTY CIRCUIT COURT IS REVERSED AND THIS CAUSE IS REMANDED FOR A NEW TRIAL. COSTS OF THIS APPEAL ARE ASSESSED TO COPIAH COUNTY.

FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR.